IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAY FARRELL, Respondent, v. CITY OF SEATTLE, Appellant.	)	No. 56342-4-I **DIVISION ONE** UNPUBLISHED OPINION FILED: August 14, 2006

APPELWICK, C.J. — This is a worker's compensation case. The worker filed for benefits after falling ill with a gastrointestinal (GI) infection that eventually caused reactive arthritis. The Department of Labor and Industries allowed his claim, but a three-member panel of the Board of Industrial Insurance Appeals reversed. The worker appealed, and a jury reversed the Board's factual determination that his injuries were not work-related. We hold that the worker presented sufficient evidence to support the jury's finding that his illness and resulting arthritis was a work-related injury, but insufficient evidence to support a finding that it was an occupational disease. We affirm in part and reverse in

part.

FACTS

Jay Farrell is a firefighter with the Seattle Fire Department. He was working a 24-hour shift that started at 8:00 am on February 13, 2002, and ended at 8:00 am on February 14, 2002. He was on duty with three other firefighters, Richard Milligan, Aaron Hedrick, and Shawn Schenkelberg. Firefighters are not allowed to leave the fire station to eat on their own. The general practice is that each firefighter contributes money towards groceries for dinner. The food is later prepared and served at the fire station in what is known as a "clutch" dinner.

On the morning of February 13, Farrell and the other firefighters went to Safeway to purchase lunch and groceries for dinner. Among the items they purchased was a circular tray of shrimp. They were offered a discount on the tray because there was a crack in its outer packaging. They returned to the firehouse at about 12:30 pm, parboiled some of the shrimp to eat with lunch, and left the rest on the counter to thaw. Farrell ate at least ten shrimp with his lunch. Unlike the other firefighters, Farrell was working inside the firehouse that day and returned often to eat more shrimp. The remaining shrimp was eventually refrigerated.

Farrell ate more shrimp with dinner and again at approximately 11:00 pm. Milligan confirmed seeing Farrell eat shrimp at lunch, in the afternoon, and at dinner on February 13. Hedrick did not eat any shrimp between lunch and

dinner, or after dinner. Hedrick testified that Farrell ate considerably more shrimp than Hedrick. Altogether, Farrell ate a little less than half the shrimp platter. He ate more shrimp than any of the other firefighters.

Farrell became nauseated at about 11:30 pm on February 13. He started vomiting at about 3:50 am on February 14. Farrell remained ill for several days, experiencing diarrhea and weakness. He then recovered. Neither Milligan nor Hedrick remembered suffering from any illness the following days.

Approximately three weeks later, Farrell sought treatment for pain in his left foot. Farrell went to see his attending physician, Dr. Storey, who had treated him since 1997. Storey recommended that Farrell see a rheumatologist. Farrell sought treatment from Dr. David Stage, a board-certified rheumatologist. Stage diagnosed Farrell with reactive arthritis that resulted from eating contaminated food at work. Eventually, Farrell's pain spread throughout his body. Farrell had not suffered from similar symptoms prior to his February 13 gastrointestinal illness.

On May 23, 2002, Farrell filed an application for worker's compensation benefits with the Department of Labor & Industries. The Department initially allowed the claim on July 16, 2002, and affirmed its order on December 12, 2002, after the City sought reconsideration. The City appealed. On May 18, 2004, a three-judge panel (the Panel) of the Board of Industrial Insurance Appeals (BIIA) ruled that Farrell did not sustain an industrial injury or occupational disease within the meaning of the Industrial Insurance Act and

reversed the allowance of the claim. One member of the Panel dissented.

Farrell appealed the Panel's May 18 order to the superior court. The trial in this matter was under RCW 51.52.115. The depositions and hearing transcript were read to a jury. Farrell presented Storey's testimony. Storey examined Farrell on April 3, 2002. Storey testified that he did have an opinion, on a more probable than not basis, that bacterially contaminated food Farrell ate on February 13 was a proximate cause of Farrell's reactive arthritis. He testified that Farrell's history, onset of symptoms, and "all the evidence to this point suggests that [Farrell] had, in fact, suffered from a form of gastroenteritis related to the food . . . that was ingested and then subsequently developed reactive arthritis as a result of that contamination." A May 28, 2002 chart note reflects Storey's diagnosis that Farrell had "[r]eactive arthritis secondary to postinfectious gastroenteritis, work related by history."

Storey testified that the diagnosis of GI infection due to bacterially contaminated food is "almost always retrospective" and "has to do with the onset of symptoms after an ingestion of food, the kind of symptoms [patients] present with, the severity of their symptoms." Storey did not inquire about other food that Farrell ate that day or earlier, and did not obtain a sample of the food or of Farrell's stool. He admitted that a more thorough food history would have been helpful. However, Storey testified that neither a stool sample nor a culture of the suspected contaminated food is required to diagnose on a more probable than not basis that a patient has a GI infection due to bacterially contaminated food.

Storey did not eliminate a viral cause of Farrell's GI complaints on a more probable than not basis, and could not say on a more probable than not basis which particular pathogen contaminated the food Farrell ate on February 13. Despite these uncertainties, Storey reaffirmed his May 28 diagnosis.

Farrell also presented Stage's testimony. When Stage first examined Farrell in 2002, he had Farrell's history and some laboratory results from Storey. At that time, Stage's opinion was that on a more probable than not medical basis, Farrell's ingestion of food at the fire station on February 13 was a proximate cause of his gastrointestinal illness, and that the gastrointestinal illness proximately caused the reactive arthritis. Subsequently, Stage reviewed extensive medical records, including reports from other doctors as well as medical records from two other clinics. After reviewing this additional medical data, Stage's opinion was the same.

Stage could not eliminate a viral cause of Farrell's gastrointestinal illness, but thought "that on a more probable than not basis, it was bacterial, not viral." Stage also testified that while it was possible that anything Farrell ate in the 10 days prior to his GI infection could have caused the upset, the history he obtained made the shrimp the most likely explanation. Like Storey, Stage testified that neither a stool sample nor a culture of the suspected contaminated food is necessary to diagnose on a more probable than not basis that a patient had a gastrointestinal illness due to bacterially contaminated food. Stage testified that "[i]t would be nice if [food cultures] were available, but of course, it

is . . . practically never something that is available to us." Stage could not "recall a single instance where we have had the opportunity to culture the food that was suspect in the cause of the reactive arthritis."

The City presented the expert medical testimony of Drs. Jane Koehler, John Canar, and Charles Bedard. Koehler testified that she was unable to form a reasonable conclusion as to the cause of Farrell's GI symptoms, but did conclude that the shrimp did not cause his symptoms. Canar, who initially attributed Farrell's illness to the shrimp, later explained that his opinion changed. Canar testified that he would need cultures of the shrimp and Farrell's stool to conclusively prove that the shrimp caused the reactive arthritis, and that his review of the medical records and literature led him to conclude that in the absence of this bacterial evidence it was not possible to determine whether or not the food caused Farrell's illness on a more probable than not basis. Bedard similarly testified that anyone trying to determine what caused Farrell's illness should take a food history of at least two days, and that there was no clear evidence to suggest that the shrimp more probably than not caused the GI infection. He also testified that there was no evidence to suggest that Farrell's nausea and vomiting episode was associated with the development of reactive arthritis.

The following two questions were presented to the jury, and the jury answered each question "no":

> QUESTION: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Farrell's February 13, 2002 gastrointestinal infection and resulting reactive arthritis was not an industrial

injury?. ANSWER: NO

QUESTION: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Farrell's February 13, 2002 gastrointestinal infection and resulting reactive arthritis was not an occupational disease? ANSWER: NO

Implicit in the jury's findings that Farrell suffered an industrial injury and an occupational disease is a finding that he was injured in the course of employment. Thus, under the facts of this case, the jury must have found that something Farrell ate while at work on February 13 caused his GI infection and resulting arthritis.[1]

The trial court entered judgment in favor of Farrell, reversing the Panel's May 18 order and thereby reinstating the Department's December 12 order. The City filed a motion for entry of judgment as a matter of law and, in the alternative, for a new trial. The trial court denied the City's motion. The City appeals.

ANALYSIS

I. Standard of Review

A trial court's order denying a CR 50 motion for judgment as a matter of law is reviewed de novo. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A trial court's order denying a motion for a new trial is reviewed for abuse of discretion. Sommer v. Dept. of Health & Human Svcs., 104 Wn. App. 160, 170, 15 P.3d 664 (2001). In this case, the City's arguments on its motion for a new trial parallel its arguments on its motion for judgment as a

[1] It is evident from the parties' briefs that they accept this implication of the jury's verdicts because both parties address the sufficiency of the evidence to support a finding of causation.

matter of law.

If a party has been fully heard and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party, the court may grant a motion for judgment as a matter of law. CR 50(a)(1). The non-moving party "is entitled to the benefit of all testimony in his favor, and of all reasonable inferences to be

drawn therefrom." Halder v. Dep't of Labor & Indus., 44 Wn.2d 537, 542, 268 P.2d 1020 (1954); Omeitt v. Dep't of Labor & Indus., 21 Wn.2d 684, 685, 152 P.2d 973 (1944). The court considers the entire record, including all medical testimony from all parties. Petersen v. Dep't of Labor & Indus., 40 Wn.2d 635, 245 P.2d 1161 (1952). The court will not weigh the evidence but will "search the entire record to find evidence which tends to support the verdict." Halder, 44 Wn.2d at 545-46. If there is more than a mere scintilla of evidence supporting the jury's verdict, the court must deny the motion for judgment as a matter of law. Omeitt, 21 Wn.2d at 686.

II. Farrell Presented Sufficient Evidence to Support a Finding That His GI Infection and Resulting Arthritis Was More Probably Than Not Caused by Something He Ate at Work

The test to determine if a worker was in the course of employment while eating is whether the eating activity is permissible and incidental to the duties of the job such that it does not remove the worker from the course of his or her employment. In re Philip Carstens, Jr., BIIA Dec., 89 0723 (1990). The City concedes that firefighters eating at the workplace are acting in the course of employment.

The causal connection between a worker's employment and his or her medical condition must be established by competent medical testimony that shows that the condition was probably, rather than possibly, caused by the employment. Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). The worker must also provide evidence that an initial industrial

injury more probably than not caused a subsequent disability. Loushin v. ITT Rayonier, 84 Wn. App. 113, 122, 924 P.2d 953 (1996). The City concedes that Farrell provided sufficient evidence for the jury to find that he suffered from a GI infection that resulted in reactive arthritis, and to find that food poisoning from one of six pathogens was the cause of the GI infection. However, the City argues that Farrell failed to meet his burden to show that something he ate at work caused his infection in the first instance.

It is true that the testimony of the medical witnesses is inconsistent, and that the jury, if they believed the City's experts, would conclude that Farrell failed to meet his burden of showing a causal link between the food he ate at work and the resulting GI infection and arthritis. However, Farrell presented the testimony of two medical experts who held the opinion that, more probably than not, food he ate at work on February 13 caused his GI infection, and the GI infection caused the resulting arthritis. They held this opinion despite not having a culture of the suspected food or a stool sample, and stated that they did not need these items to form an opinion on a more probable than not basis. The City's contradictory expert testimony created "a classic battle of the experts, a battle in which the jury must decide the victor." Intalco Aluminum Corp. v. Dep't of Labor & Indus., 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (quoting Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535 (D.C. Cir. 1984)).

The City argues that the use of the "magic words" more probable than not by Farrell's experts is not sufficient for Farrell to meet his burden of proof. It is

true that mere invocation of the words "more probable than not" would not be sufficient to take the case to the jury. If "indispensable testimony is, in effect, retracted or completely negatived as a result of inconsistencies and contradictions in the other testimony of the same witness, that fact is to be considered in passing upon the motion" for judgment as a matter of law. Halder, 44 Wn.2d at 542. Where, as here, a medical expert testifies to his or her medical opinion, and has a factual basis for that opinion, then the words "more probable than not" do take on a magic quality allowing the matter to go the jury. In one significant decision, the BIIA has characterized testimony couched in terms of probability rather than possibility as use of the "magic legal words." See Carstens, 89 0723. This characterization simply acknowledges that once qualified experts present their factually–based medical opinions, any contradiction between the experts' testimony is a matter for the jury to resolve.

A similar sufficiency of the evidence dispute was at issue in the Halder case. In that case, the worker hit his head on a steel pipe several times and then again "with great force." Halder, 44 Wn.2d at 539. He suffered severe pain and bleeding. Later, he felt dizzy, "sort of hazy," "whoozy", and had trouble concentrating for several days. He then suffered a severe stroke. Dr. John Collins treated the worker from the date of his stroke through his recovery. Halder, 44 Wn.2d at 539-40.

At trial, although Collins used the words possibly, presume, might, if, and assume, he also testified that based upon a reasonable medical certainty, it was

probable that the blow caused the stroke. Halder, 44 Wn.2d at 540. Collins stated that his opinion was influenced by the fact that the worker's premonitory symptoms occurred for "at least for several weeks preceding his paralysis." Halder, 44 Wn.2d at 541. In fact, these symptoms had only been occurring for several days. In addition, Collins considered that the worker had not experienced those symptoms before receiving the blows on the head. Halder, 44 Wn.2d at 541. Collins testified that he did not know and could not determine whether a clot or a hemorrhage brought on the stroke, but concluded that it was a clot. In an earlier medical report, he had written that it was "[e]quivocal" whether the stroke resulted from the injury. At trial he testified that this statement meant "that it is questionable; I didn't know." Halder, 44 Wn.2d at 541-42.

Two other experts testified that it was extremely unlikely that the injury had any relation to the stroke, instead attributing the stroke to arteriosclerosis. Halder, 44 Wn.2d at 542. The Department in the Halder case argued that Collins'

> testimony, considered as a whole, is replete with inconsistencies and contradictions; that his explanations clearly show that his opinion was based upon speculation; that his opinion rested in part upon an erroneous assumption of fact; and, in effect, that it was outweighed by the testimony of [the Department's] medical witnesses.

Halder, 44 Wn.2d at 542. The Halder court stated:

> We have examined each of the asserted inconsistencies and contradictions in Dr. Collins' testimony. None of them, nor all of them considered together, amounts to a negation or retraction of his testimony upon which appellant relies. The witness remained

> firm in his opinion that the blow on the head was the probable cause of the stroke. Such inconsistencies and contradictions as there were may have affected the weight to be accorded Dr. Collins' opinion testimony. But this was for the jury to determine—not the court.

Halder, 44 Wn.2d at 542-43. The Halder court further noted:

> In our view, this testimony does not warrant the court in saying, as a matter of law, that Dr. Collins' opinion as to causal relationship was based upon speculation or surmise. The cases are not many where a medical expert can describe, in positive and categorical terms, the precise bodily reactions whereby a particular trauma has produced a specific disability. Here the doctor expressed his opinion that such a result did occur, and explained one way in which this could have been brought about. We think this is sufficient to take the issue to the jury.

Halder, 44 Wn.2d at 545. The Halder court did not weigh the evidence but rather searched the record for evidence favorable to the worker to decide the motion for judgment as a matter of law.

A contrary result was reached in the Sayler and Sawyer cases, where the court determined that there was insufficient evidence to support a finding of a causal relationship between the injury and the subsequent medical condition. The Sayler court held that an expert opinion based on an incomplete or inaccurate medical history is without probative value if "the doctor has not been advised of a vital element bearing upon causal relationship." Sayler v. Dep't of Labor & Indus., 69 Wn.2d at 893, 896-97, 421 P.2d 362, (1966). In that case, both of the worker's experts testified that if they had known of a prior injury that the worker had not disclosed until late in the proceedings, they would not have supported the worker's medical theory. The court concluded that the prior injury was a material omission from the medical history, and that the expert testimony

supporting the worker's theory was thus without probative value. The Sayler court concluded that the record did not support a finding of a causal relationship. Sayler, 69 Wn.2d at 897.

And in Sawyer, the sole medical expert who testified on the worker's behalf testified that the worker "may have had" a skin condition resulting from a workplace injury. Sawyer v. Dep't of Labor & Indus., 48 Wn.2d 761, 765-66, 296 P.2d 706, (1956). He used the words may, plausible, assume, might, and should, and although he had had "ample opportunity" to state that there was a causal relationship between the injury and the subsequent dermal condition, he did not do so. Sawyer, 48 Wn.2d at 766-67. The Sawyer court characterized the expert's testimony as "assumption pyramided upon assumption, amounting to mere speculation and conjecture." Sawyer, 48 Wn.2d at 767. The court concluded that this testimony was not sufficiently probative to establish a causal relationship between the worker's injury and subsequent dermal condition. Sawyer, 48 Wn.2d at 769.

The facts here are like those in Halder, and not like those in Sayler or Sawyer. As in Halder, Farrell's experts remained firm in their testimony as to the work-related cause of the injuries. Any inconsistency within or between the testimony of the various medical experts was for the jury to resolve. Unlike in Sayler, Farrell did not fail to disclose a material fact that would have changed his experts' opinions such that they would have no probative value. And unlike in Sawyer, Farrell's experts did expressly state their opinions in favor of Farrell's

theory on a more probable than not medical basis.

The City notes that the facts of this case are dissimilar from those in Intalco, where several workers presented objective evidence that known neurotoxins was present at their workplace, but could not identify the exact chemical that caused their injuries. The Intalco court held that in such circumstances, the injured worker need not specify the exact toxin responsible for the injury to meet the burden of proof. Intalco, 66 Wn. App at 658. The City contends that Farrell has not presented proof similar to that presented by the Intalco workers, and that any connection between the shrimp Farrell ate and his illness is thus merely speculative. Specifically, the City notes that unlike in Intalco, Farrell was the only firefighter who became ill after eating the shrimp, his doctors were not able to trace the illness to the place of employment or eliminate other possible causes of infection, and a full factual record of his food history was unavailable. However, Farrell's medical experts testified that even without this information, they could and did form medical opinions on a more probable than not basis that he ate food at work that caused his illness. From this expert testimony, it was permissible for the jury to infer that the food was actually contaminated. This is sufficient to meet Farrell's burden of proof. We conclude that Farrell presented sufficient evidence on causation to support taking his case to the jury.

III. Farrell Presented Sufficient Evidence that He Had A Work-Related Injury, But Not An Occupational Disease

There are two categories in which Farrell's GI infection and resulting

arthritis could fit under the industrial insurance act: injury or occupational disease. "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. "'Occupational disease' means such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140.

A different test applies to determine coverage under the industrial insurance act in each category. An injury is compensable if there is a relationship between the injury and "some identifiable happening, event, cause or occurrence capable of being fixed at some point in time and connected with the employment." Garrett Freightlines v. Dep't of Labor & Indus., 45 Wn. App. 335, 342, 725 P.2d 463 (1986). In the case of an occupational disease, however, the worker must show that his or her medical condition arose "naturally" out of employment. The worker must show that distinctive work conditions more probably cause disease than conditions in everyday life or all employments. Intalco, 66 Wn. App. at 654.

The City argues that food poisoning should be analyzed as an occupational disease because the statutory definition of occupational disease includes the word "infection." The City's argument essentially implies that no traumatic incident that causes an infection can be an injury, because the word "infection" appears in the definition of occupational disease. The Department argues that that Farrell suffered from an industrial injury and not an occupational

disease. Farrell argues that his illness and resulting arthritis constitutes an injury within the meaning of the industrial insurance act, but that he would also be entitled to compensation even if it is considered an occupational disease.

Taken together, the jury's verdicts imply that Farrell suffered both an injury and an occupational disease. None of the parties argues that the jury's verdicts are in error because a condition could not be both an injury and an occupational disease. We need not decide whether an infection such as food poisoning can be both an injury and an occupational disease. We decide separately, under the facts of this case, whether Farrell's infection meets the standard for injury, and whether it meets the standard for occupational disease.

Under the facts of this case, we hold that Farrell's ingestion of contaminated food at work that resulted in a GI infection constituted an injury. We reject the City's argument that an infection must be an occupational disease because the word "infection" appears in the statutory definition of "occupational disease." When a worker has a work-related injury that results in a disease, he or she may be covered under the injury rules even though the word "disease" is included in the statute defining occupational disease. When the disease process is started by a sudden and tangible happening of a traumatic nature, the resulting medical condition is covered under the injury rules even though the condition is a disease.[2] Likewise, when a worker has a work-related injury that

[2] For example, in Harbor Plywood Corp. v. Dep't of Labor & Indus., 48 Wn.2d 553, 295 P.2d 310 (1956), the worker was injured when a plank struck his testicle. He had a pre-existing cancerous condition in his testicle. Doctors "testified that the injury most probably caused the carcinoma to spread, delayed its discovery, and hastened the workman's death." Harbor Plywood, 48 Wn.2d at 556-57. The court held that "if an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, the

results in an infection, it is not axiomatic as the City contends that the worker has an occupational disease and not an injury.

Second, Farrell's GI infection from food poisoning fits the statutory definition of injury. While "our Industrial Insurance Act is unique and the opinions of other state courts are of little assistance in interpreting our Act," Dennis, 109

resulting disability is to be attributed to the injury and not to the pre-existing physical condition." Harbor Plywood, 48 Wn.2d at 556. The court stated that "'[p]re-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.'" Harbor Plywood, 48 Wn.2d at 556 (quoting 1 Larson's Workmen's Compensation Law 170, § 12.20).

Wn.2d at 482-83, the reasoning from several early cases from other jurisdictions is helpful in determining whether an infection can be an injury under the Washington act.

In McCauley v. Imperial Woolen Co., 261 Pa. 312, 312, 104 A. 617 (1918), the court considered a case in which a wool sorter handled wool infected with anthrax germs. The germs contacted a small scratch on his neck, and as a result the worker contracted anthrax and died. McCauley, 261 Pa. at 323-24. The court stated:

> Here, the anthrax germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden or violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working, had unexpectedly and suddenly bitten him.

McCauley, 261 Pa. at 328. An early case from New York is also instructive. In Connelly v. Hunt Furniture Co., 240 N.Y. 85, 147 N.E. 366 (1925), an embalmer's helper handled a decayed corpse. "Some [gangrenous] matter entered a little cut in his hand, and later spread to his neck when he scratched a pimple with the infected finger. General blood poisoning set in, and caused his death." Connelly, 240 N.Y. at 85. In addressing whether an infection is a disease or an accident, the court wrote:

> We attempt no scientifically exact discrimination between accident and disease or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one of the other, but often overlap. The tests to be applied are those of common understanding as revealed in common speech. We have little doubt that common understanding would envisage this mishap

> as an accident, and that common speech would so describe it. Germs may indeed be inhaled through the nose or mouth, or absorbed into the system through normal channels of entry. In such cases their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time. For this as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease and not an accident. Our mental attitude is different when the channel of infection is abnormal or traumatic, a lesion or a cut. If these become dangerous or deadly by contact with infected matter, we think and speak of what has happened as something catastrophic or extraordinary, a mishap or an accident, though very likely a disease also. A common sense appraisement of everyday forms of speech and modes of thought must tell us when to stop.

Connelly, 240 N.Y. at 85-86 (internal citations and quotations omitted). The court continued:

> We make little progress when, viewing infection as an isolated concept, and ignoring its channels of attack or the manner of its coming, we say, upon the authority of science, that infection is a disease. It may be this, and yet an accident too. . . . Sunstroke, strictly speaking, is a disease, but the suddenness of its approach and its catastrophic nature have caused it to be classified as an accident. Tuberculosis is a disease, yet if it results from the sudden inhalation of poisonous fumes, it may also be an accident. A like ruling has been made where some extreme and exceptional exposure has induced pneumonia or rheumatism.

Connelly, 240 N.Y. at 87-88 (internal citations and quotations omitted).

And in South Dakota, the court, relying on the reasoning in Connelly, held that a worker who died as a result of eating food contaminated with botulism toxin suffered an "injury by accident" compensable under that state's worker's compensation laws. Meyer v. Roettele, 64 S.D. 36, 36, 264 N.W. 191 (1935). The Meyer court noted:

> We are of the view that a disease may be an "injury by accident" within the meaning of our statute. The exclusion is of any disease which is not an accidental injury or which does not result from such

> injury. It is generally recognized that accident as contemplated by the Workmen's Compensation Law is distinguished from so-called occupational diseases which are the natural and reasonably to be expected result of workmen following certain occupations for a considerable period of time. On the other hand, if the element of suddenness or precipitancy is present and the disease is not the ordinary or reasonably to be anticipated result of pursuing an occupation, it may be regarded as an injury by accident and compensable.

Meyer, 64 S.D. at 41.

We hold that Farrell's GI infection was an injury under the industrial insurance act. The infection was caused by the ingestion of organisms foreign to Farrell's body and by the toxins they produced. It was a sudden happening, notorious, fixed as to time, and susceptible of investigation. The dictionary definition of the word trauma is "an injury or wound to a living body caused by the application of external force or violence." Webster's Third New International Dictionary 2432 (1969). Here, the external microscopic pathogens exerted force on Farrell's body and resulted in an injury to him. Thus, the infection was of a traumatic nature, although the mechanism was microscopic and not perceived.

We next decide whether Farrell's GI infection meets the standard of an occupational disease. To do so, we determine whether Farrell has shown distinctive work conditions that more probably caused his disease than conditions in everyday life or all employments. See Intalco, 66 Wn. App. at 654. Farrell argues that because firefighters cannot leave the workplace to eat and there is a common practice of shared meals, these distinctive conditions satisfy the test allowing recovery for his illness as an occupational disease. However,

nothing in the record shows any greater risk of food poisoning among firefighters (unlike the testimony in Sacred Heart Med. Cen. v. Labor & Indus., 92 Wn.2d 631, 636, 600 P.2d 1015 (1979), that there is a greater risk of hepatitis infection among nurses). And although the medical testimony supported findings that some bacteria is transmitted between people and food by improper food handling, nothing in the record indicates this is more likely or common at a firehouse than a restaurant, a home, or other workplace. See also Witherspoon v. Dep't of Labor & Indus., 72 Wn. App. 847, 851, 866 P.2d 78 (1994) (holding that worker seeking compensation for occupational disease after developing meningitis allegedly because infected co-worker coughed in his face failed to present evidence that conditions of his employment increased his contact with meningitis bacteria than in ordinary life or other employments).

In sum, Farrell presented sufficient evidence to create a jury question as to the causal connection between something he ate at work and his GI infections and resulting arthritis. Further, Farrell's GI infection and resulting arthritis meet the statutory definition of "injury" under the industrial insurance act. Therefore, the trial court properly denied the City's motion for judgment as a matter of law as to injury. However, Farrell did not present sufficient evidence to support a finding that he suffered an occupational disease, because he did not show that distinctive conditions of his employment more probably caused his disease than conditions in everyday life or all employments. Therefore, the trial court erred in denying the City's motion for judgment as a matter of law as to occupational

disease.

We affirm the jury's verdict as to injury, and vacate the jury's verdict as to occupational disease. The trial court did not err in denying the City's motion for a new trial. No new trial is necessary, because judgment was properly entered in Farrell's favor under either basis for recovery.

IV. Attorney Fees

Farrell seeks his attorney fees and costs on appeal under RCW 51.52.130. We award Farrell reasonable attorney fees and costs on appeal.

We affirm in part and reverse in part.

Appelwick, C.J.

WE CONCUR:

Azid, J.

Bahuer, J.